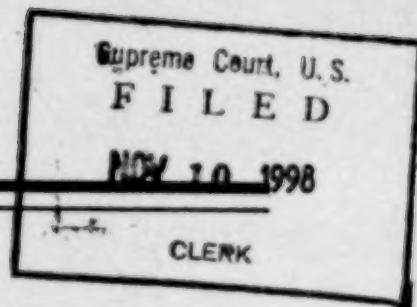


12

No. 98-84



IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1998

National Collegiate Athletic Association,  
*Petitioner,*

v.

R.M. Smith,  
*Respondent.*

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit**

**BRIEF FOR AMICI CURIAE IN  
SUPPORT OF PETITIONER**

Sheldon Elliot Steinbach  
AMERICAN COUNCIL ON  
EDUCATION  
One Dupont Circle  
Suite 835  
Washington, D.C. 20036  
(202) 939-9355

Richard O. Duvall  
Robin L. Rosenberg\*  
David A. Vaughan  
HOLLAND & KNIGHT LLP  
2100 Pennsylvania Ave., N.W.  
Washington, DC 20037  
(202) 457-5921

Of Counsel  
\* Counsel of Record

*Counsel for Amici Curiae*

---

(Amici listed on inside cover)

16 pp

American Council on Education  
American Association of Colleges of Nursing  
American Association of State Colleges and Universities  
Association of American Universities  
Association of Community College Trustees  
Association of Governing Boards of Universities and  
Colleges  
Council for Advancement and Support of Education  
The Council on Governmental Relations  
Educational Testing Service  
National Association for Equal Opportunity in Higher  
Education  
National Association of Independent Colleges and  
Universities  
National Association of Student Personnel Administrators  
National Association of State Universities and  
Land-Grant Colleges

## TABLE OF CONTENTS

	Page
INTEREST OF <u>AMICI CURIAE</u> . . . . .	2
SUMMARY OF ARGUMENT . . . . .	4
I. ARGUMENT . . . . .	4
A. The Third Circuit's Decision Expands The Coverage Of Title IX "Almost Without Limit" To Any Non-Profit Education Association Or Organization . . . . .	6
B. The Third Circuit's Concept Of "Surrogate" Is Contrary To <i>Paralyzed Veterans</i> And Difficult To Apply . . . . .	8
C. The Third Circuit's Decision Imposes Burdens Upon Non-Profit Education Associations and Organizations Which Will Adversely Affect Their Ability To Perform Their Education Missions . . . . .	11
II. CONCLUSION . . . . .	12

TABLE OF AUTHORITIES

CASES

	Page
<u>Gebser v. Lago Vista Independent Sch. Dist.</u> , 118 S. Ct. 1989 (1998) . . . . .	7
<u>R.M. Smith v. National Collegiate Athletic Association</u> , 139 F.3d 180 (1998) . . . . .	5, 7, 8, 9, 10, 11
<u>United States Department of Transportation v.</u> <u>Paralyzed Veterans of America</u> , 477 U.S. 597 (1986) . . . . .	4, 5, 6, 7, 8, 10, 12

STATUTES

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 . . . . .	5
Title IX, the Education Amendments of 1972, 20 U.S.C. §1681(a) . . . . .	3, 4, 5, 8, 11, 12
Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) . . . . .	3, 5

RULES

S. Ct. Rule 37.6 . . . . .	2
----------------------------	---

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

National Collegiate Athletic Association,  
*Petitioner*,  
v.

R.M. Smith,  
*Respondent*.

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Third Circuit

**BRIEF FOR AMICI CURIAE AMERICAN  
COUNCIL ON EDUCATION; AMERICAN  
ASSOCIATION OF COLLEGES OF  
NURSING; AMERICAN ASSOCIATION OF STATE  
COLLEGES AND UNIVERSITIES; ASSOCIATION  
OF AMERICAN UNIVERSITIES; ASSOCIATION OF  
COMMUNITY COLLEGE TRUSTEES;  
ASSOCIATION OF GOVERNING BOARDS OF  
UNIVERSITIES AND COLLEGES; COUNCIL FOR  
ADVANCEMENT AND SUPPORT OF EDUCATION;  
THE COUNCIL ON GOVERNMENTAL RELATIONS;  
EDUCATIONAL TESTING SERVICE; NATIONAL  
ASSOCIATION FOR EQUAL OPPORTUNITY IN  
HIGHER EDUCATION; NATIONAL ASSOCIATION  
OF INDEPENDENT COLLEGES AND**



**UNIVERSITIES; NATIONAL ASSOCIATION OF  
STUDENT PERSONNEL ADMINISTRATORS; AND  
NATIONAL ASSOCIATION OF STATE  
UNIVERSITIES AND LAND-GRANT COLLEGES IN  
SUPPORT OF PETITIONER**

The American Council on Education ("ACE"); American Association of Colleges of Nursing; American Association of State Colleges and Universities; Association of American Universities; Association of Community College Trustees; Association of Governing Boards of Universities and Colleges; Council for Advancement and Support of Education; The Council on Governmental Relations; Educational Testing Service; National Association for Equal Opportunity in Higher Education; National Association of Independent Colleges and Universities; National Association of Student Personnel Administrators; and National Association of State Universities and Land-Grant Colleges support the position of the National Collegiate Athletic Association ("NCAA") in this case. The consents of all parties to this case to the filing of this brief have been filed with the Clerk.<sup>1</sup>

**INTEREST OF AMICI CURIAE**

ACE, founded in 1918, represents approximately 1,800 public and private colleges and universities across the United States, as well as over 175 non-profit educational associations and organizations, including most of the amici.

---

<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person or entity other than the amici curiae, their members or their counsel has made a monetary contribution to the preparation or submission of the brief. See Rule 37.6 of Rules of the Supreme Court of the United States.

ACE's principal purpose is to further the goals of higher education, including the interests of component groups of the academic community: students, faculty, administration, and employees. ACE, like other education associations and organizations, operates independently of its members.

Education associations and organizations like the amici engage in many activities. They sponsor research and publish reports, advocate education goals, such as the need for national investment in higher education, hold professional development seminars, convene task forces, workshops, and meetings of education leaders, and collect and publish statistical information relevant to higher education.

Many of the non-profit educational association and organization members of ACE, including the NCAA, are not recipients of federal financial assistance. Many of them, but not all, receive dues from or charge membership fees to their members which may be recipients of federal financial assistance. Some of those non-profit educational association and organization members of ACE are participating as amici for this brief.

Some non-profit educational organizations, such as ACE, receive federal financial assistance. As a direct recipient of federal financial assistance, ACE is subject to Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. Nevertheless, consistent with ACE's mission of advancing the interests of higher education including those of its component groups of the academic community such as its non-profit education association and organization members, ACE appears herein as an amici.

\* \* \*

The amici wish it to be clear that they are not troubled by being subject to Title IX's obligations where they are recipients of federal funds. In those situations they "... are in a position to accept or reject. . ." (United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597, 606 (1986)) the obligations that come with acceptance of federal funds. Thus, ACE, as a direct recipient of federal funds, has no objection to being subject to Title IX and, indeed, fully supports Title IX's goals, as do those amici which are not direct recipients of federal funds and, thus, not covered.

### SUMMARY OF ARGUMENT

The decision of the Third Circuit in this case has serious consequences for independent non-profit education associations and organizations which reach far beyond the NCAA. The decision is inconsistent with Congressional intent and this Court's precedent. It will impose burdens upon education associations and organizations that do not receive federal funding, which will adversely affect their ability to perform their missions and threaten the participation of their members which do receive federal funding in establishing and achieving the goals of education associations and organizations. Prior to the Third Circuit decision in this case, none of these organizations had any reason to know that any were covered by the program-specific statutes.

#### I. ARGUMENT

In United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986), this Court recognized identical language in program-specific statutes such as Title IX, the Education Amendments of

1972, 20 U.S.C. §1681(a) ("Title IX") was intended to be given the same meaning.<sup>2</sup> With respect to such statutes which are triggered by the receipt of "Federal financial assistance," regulatory reach is limited to the recipient and does not extend beyond the recipients to mere beneficiaries of such assistance. 477 U.S. at 610.

The Court of Appeals below, however, held that the NCAA -- which does not receive federal financial aid -- is covered by Title IX because it receives dues from many of its members which receive Federal financial aid. R.M. Smith v. National Collegiate Athletic Association, 139 F.3d 180 (1998).<sup>3</sup> In so doing, the Third Circuit recognized that Section 504 of the Rehabilitation Act contains language identical to Title IX with respect to receiving Federal financial assistance. App. 14a. Nevertheless, the Court of Appeals did not apply Paralyzed Veterans' definition of "recipient" to Title IX, holding instead that the receipt of dues by the NCAA from members which receive Federal funds subjects the NCAA to the requirements of Title IX. App. 15a.

Paralyzed Veterans emphasized that federal coverage under program-specific statutes such as Title IX does not

---

<sup>2</sup> The other program-specific statutes include Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) ("Title VI") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). Title VI and Section 504, like Title IX, all use the term "receiving Federal financial assistance" to trigger regulatory coverage. In Paralyzed Veterans, Section 504 was at issue. As the Court explained, this limitation is required by the contractual nature of these laws as spending clause legislation.

<sup>3</sup> The Third Circuit opinion is reprinted in the Appendix to the Petition for a Writ of Certiorari ("App."). All appendix citations herein will be to that appendix.



"follow[] the aid past the recipient to those who merely benefit from the aid." *Id.*, 477 U.S. at 607. The Third Circuit distinguished Paralyzed Veterans stating that the NCAA is "not merely an incidental beneficiary of federal funds;" (App. 16a) and that the recipient of the federal funds in Paralyzed Veterans could not be said to be a "surrogate" for the alleged beneficiary of the funds. *Id.* The Third Circuit stated that the alleged "relationship between the members of the NCAA and the organization itself is qualitatively [different than the relationship in Paralyzed Veterans] . . . ." *Id.* Respondent's claim was also characterized as follows:

the NCAA receives dues from member institutions, which receive federal funds. As discussed above, this allegation would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss.

App. 19a. The Third Circuit's attempt to distinguish Paralyzed Veterans fails and must be reversed.

A. The Third Circuit's Decision Expands The Coverage Of Title IX "Almost Without Limit" To Any Non-Profit Education Association Or Organization.

In Paralyzed Veterans, this Court pointed out that in limiting coverage to recipients of federal financial assistance, Congress imposes the obligations of program-specific statutes ". . . upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds. In this case, the

only parties in that position are the airport operators." 477 U.S. at 606. The Court warned that "*beneficiaries* should not be confused with intended *recipients*." *Id.* (Emphasis in original). In Paralyzed Veterans, it was ". . . clear that the airlines do not actually receive the aid; they only benefit from the airports' use of the aid." *Id.* at 607. To decide otherwise would give "almost limitless coverage" to program-specific statutes by reason of the term "receiving Federal financial assistance." *See id.* at 608.

In this case, the Third Circuit achieves a result contrary to Paralyzed Veterans with an unnecessarily broad interpretation of an administrative regulation adopted before Paralyzed Veterans was decided. With respect to dues, the Circuit Court stated that the receipt of dues by an organization from members which receive federal funds ". . . would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds. . . ." App. 19a.

Membership dues are not federal financial assistance. And, the receipt of dues by an association or other organization should not be an indicia that the entity is "receiving Federal financial assistance." In such circumstances, the association is in no position to even know whether any member is a recipient of federal funds. *Cf. Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S.Ct. 1989, 1998 (1998)(basing regulatory coverage upon contract between funding agency and recipient which provides "notice" to recipient). Moreover, the receipt of federal funds by a member in no way suggests that the association was intended by Congress as the recipient of any part of the federal funds. Thus, this Court has stated that federal coverage in these situations does not "follow[] the aid past the recipient to those who merely benefit from the aid."

Paralyzed Veterans, 477 U.S. at 607. There is no reason to chart a different course here.

By imposing Title IX upon education associations and organizations by reason of membership dues, those entities are not "... in a position to accept or reject..." the obligations imposed by Title IX. Associations which support the goals of Title IX but cannot afford the costs of meeting many of the burdens of Title IX -- designations of a compliance official, recordkeeping and reporting requirements, compliance audits -- may be forced to limit their membership or raise their dues. In either event, they will be hampered in accomplishing their missions; moreover, excluded members will be denied opportunities to participate in developing and achieving the goals of education associations and organizations.

B. The Third Circuit's Concept Of "Surrogate" Is Contrary To *Paralyzed Veterans* And Difficult To Apply.

In addition to the indicia of dues, the Third Circuit found that the NCAA is essentially a "surrogate" for its members many of which receive federal funds. App. 14a. Thus, it concluded that the NCAA is not merely an "incidental beneficiary of federal funds" and that the relationship between the NCAA and its members is "qualitatively different" than the relationship analyzed in Paralyzed Veterans. App. 16a.

The Third Circuit described the relationship between the NCAA and its members as follows:

The NCAA is an unincorporated association comprised of public and private colleges and universities and is responsible

for promulgating rules governing all aspects of intercollegiate athletics, including recruiting, eligibility of student-athletics, and academic standards. The member institutions agree to abide by and enforce these rules. . . .

App. 3a.

\* \* \*

The NCAA acts no less than the association in Horner as an agent of its member institutions merely because it lacks statutory authority for its activities. The NCAA is a voluntary organization created by and comprised of the educational institutions which essentially acts as their *surrogate* with respect to athletic rules.

App. 14a (emphasis added).

The Circuit Court attempted to distinguish the relationship in Paralyzed Veterans from the relationship between the NCAA and its members, stating that, in Paralyzed Veterans, the commercial airlines were "merely an incidental beneficiary of federal funds" received by airports. See App. 16a. In fact, the relationship between airports and airlines had been described by the District of Columbia Circuit Court of Appeals as being "'inextricably intertwined'" with the "'indissoluble nexus'" being commercial air transportation. See Paralyzed Veterans, 477 U.S. at 610, citing Paralyzed Veterans of America v. CAB, 752 F.2d at 714. The District of Columbia Court of Appeals had found commercial airlines to be part of a federally assisted program because they used airports which were



recipients of federal funds and because "airports are 'indispensable' to air travel." Id.

Just as the District of Columbia Circuit's reasoning in Paralyzed Veterans was found to be "overbroad and unpersuasive," the "surrogate" reasoning of the Third Circuit in this case fails. See id. This Court stated that the Court of Appeals reasoning would mean that "various industries and institutions would become part of a federally assisted program or activity, not because they had received federal financial assistance, but because they are 'inextricably intertwined' with an institution that has." Id. Such an interpretation would give the term "receiving federal financial assistance" in Section 504 of the Rehabilitation Act "... a scope broader than its language implies, and one never intended by Congress." Id. at 611. This Court therefore refused to "fuse" airports and commercial airlines into a single program or activity, emphasizing that reference to grant statutes rather than "hypothetical collective concepts" like the nexus rationale advanced by the respondent in Paralyzed Veterans is the proper basis for determining whether a program or activity is covered. Id.

In this case, the Circuit Court did not look at any grant statutes by which members of the NCAA receive financial aid to determine whether the NCAA is a recipient of federal financial aid under those statutes. Rather, the Third Circuit found that the NCAA is a "surrogate" for its members and by use of a different term than in Paralyzed Veterans "fused" the NCAA and its members. This is precisely the type of analysis rejected by the Court in Paralyzed Veterans; it should be rejected again. Otherwise, educational associations and organizations, like amici, will have no sure basis for determining whether they are "surrogates" for their members and the jurisdictional determination whether an

entity is covered by the program-specific laws will be heavily factbound and unpredictable.

C. The Third Circuit's Decision Imposes Burdens Upon Non-Profit Education Associations and Organizations Which Will Adversely Affect Their Ability To Perform Their Education Missions.

In addition to the uncertainty that the Third Circuit's "surrogate" theory of regulatory coverage imposes upon education associations and organizations not receiving federal funds, those associations and organizations will be burdened with the administrative requirements and costs imposed upon entities subject to Title IX coverage -- even though prior to this case, those private entities had no reason to know they were covered in the first place. This will strain already stringent budgets in many cases and will divert personnel from other duties to assure compliance with Title IX regulations for recordkeeping and reporting. In addition, these associations and organizations will be subject to the cost and diversion of staff resources to defend themselves against attenuated claims that they are "surrogates."

Where the claim is based upon dues paid by members, many of these associations will be faced with excluding members to limit their exposure to costly litigation or be forced to raise dues (an unrealistic choice where existing dues are a limiting factor for members). Either way, education associations and organizations are likely to lose members. As a result, both the association's, as well as members', ability to participate in developing and advancing education policy will be stifled.

The imposition of these costs and burdens are particularly inappropriate where education associations will

not have had the opportunity "to accept or reject" the obligations that come with being an actual recipient of federal financial assistance. Rather, they will have been unduly burdened by a strained, "almost limitless" interpretation of the term "receiving Federal financial assistance."

## II. CONCLUSION

The decision of the Third Circuit avoids this Court's conclusions in Paralyzed Veterans that regulatory coverage under program-specific statutes, such as Title IX, does not "follow[] the aid past the recipient to those who merely benefit from the aid"; and that grant statutes must be examined to determine whether an entity is a recipient of federal aid rather than resort to "hypothetical collective concepts." For these reasons, the judgment of the United States Court of Appeals for the Third Circuit in this case should be reversed.

Respectfully submitted,

Sheldon Elliot Steinbach	Richard O. Duvall
AMERICAN COUNCIL ON	Robin L. Rosenberg*
EDUCATION	David A. Vaughan
One Dupont Circle	HOLLAND & KNIGHT LLP
Suite 835	2100 Pennsylvania Ave., N.W.
Washington, D.C. 20036	Washington, DC 20037
(202) 939-9355	(202) 457-5921

Of Counsel

*Counsel for Amici Curiae*

\* Counsel of Record

---